

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

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STEPHEN E. BILENKY, )  
Administrator of the Estate of )  
Frank S. Wright, Deceased, ) CIVIL ACTION NO.  
Plaintiff, ) 2:13cv345  
v. )  
RYOBI, LTD., et al., )  
Defendants. )  
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TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

November 24, 2014

BEFORE: THE HONORABLE DOUGLAS E. MILLER  
United States Magistrate Judge

APPEARANCES:

SHAPIRO, LEWIS & APPLETON, P. C.  
By: Richard N. Shapiro  
And  
SULLIVAN, MORGAN & CHRONIC, LLC  
By: Robert C. Sullivan  
Counsel for the Plaintiff

1 APPEARANCES CONT'D:

2 DICKIE, McCAMEY & CHILCOTE, P.C.

3 By: Frederick W. Bode, III

4 And

5 HARMAN CLAYTOR CORRIGAN & WILLMAN

6 By: John R. Owen

7 Counsel for the Defendants

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1 (Hearing commenced at 2:32 p.m.)

2 **THE CLERK:** Steven E. Bilenky, et cetera, versus  
3 Ryobi, et cetera, et al., case number 2:13CV345.

4 Are counsel ready to proceed?

5 **MR. BODE:** Yes, Your Honor.

6 **MR. SULLIVAN:** Yes, we are.

7 **THE COURT:** All right. Good afternoon, everyone. I  
8 see I have, it's Mr. Sullivan, is that right?

9 **MR. SULLIVAN:** Yes, Your Honor.

10 **THE COURT:** And Mr. Shapiro, Mr. Bode, Mr. Owen. Is  
11 that right?

12 **MR. BODE:** Yes, sir.

13 **THE COURT:** And I'm sorry.

14 **MR. BODE:** Your Honor, we have Sarah Cronin who is  
15 in-house with Husqvarna.

16 **THE COURT:** Nice to see you.

17 **MR. BODE:** She used to be with the Sykes firm in  
18 Louisville, Kentucky and recently took a position within the  
19 last year, Sarah?

20 **MS. CRONIN:** Yes.

21 **MR. BODE:** With Husqvarna.

22 **THE COURT:** All right. Nice to have you. Is it  
23 going to be Mr. Sullivan and Mr. Bode primarily arguing?

24 **MR. SULLIVAN:** It is for our side, yes, Your Honor.

25 **MR. BODE:** Yes, Your Honor.

1           **THE COURT:** All right. Well, Mr. Bode, it's your  
2 motion. Well, I should say they are your motions, so I'm  
3 happy to hear from you.

4           I've read everything, and I think I know essentially  
5 which way I'm leaning, but I'm open to persuasion, which is  
6 why I asked you to be here, and also to just give ourselves  
7 all a deadline well in advance of your trial so that you  
8 could know what final preparation you need to do.

9           You're moving to exclude both Mr. Christoffersen and  
10 Mr. Dyer entirely. I assume you all haven't made any  
11 progress on resolving this on your own, so you're still  
12 looking for a ruling from me?

13           **MR. BODE:** There have been no discussions since our  
14 last meeting with Magistrate Miller, Your Honor.

15           **THE COURT:** Okay.

16           **MR. BODE:** So, yes, Your Honor, you're right, we are  
17 clearly moving to exclude Mr. Christoffersen, and if you look  
18 at Mr. Christoffersen's two reports, the one that he filed  
19 and then the one that he filed at the end of August, Your  
20 Honor, those reports are based entirely on the recalls,  
21 completely on the recalls. And it is such that in one of the  
22 plaintiff's briefs, the plaintiff said that it wasn't  
23 necessary for him to do any testing because he had -- and I  
24 think we have quoted this -- why test when the research and  
25 expert analysis shows that the failure mode was a defective

1 fuel system similar to the recalls.

2 So under the case law, and we have cited all the  
3 Fourth Circuit cases, Your Honor: *Cooper, Higginbotham,*  
4 *Hodges, the Fireman's Fund case, Oglesby.* If you look at all  
5 of those cases, his opinion has to be reliable. And his  
6 methodology is completely flawed. And all you have to do is  
7 look at his methodology and ask the question, what is the  
8 defect?

9 Mr. Owen, right before we came in here, and I were  
10 talking in your conference room, attorney's conference room,  
11 and John opened up to the last page of their subsequent  
12 brief, and he said look how they have classified the defect.  
13 He said the defect may be a fuel leak that might have been  
14 caused by the pipe -- the hose coming off the fuel spud.

15 **THE COURT:** But isn't there --

16 **MR. BODE:** I'm sorry, Your Honor, go ahead.

17 **THE COURT:** No, no. Is there anything? I mean, I  
18 agree with you that it could be more clear, and those are the  
19 questions that I have for Mr. Sullivan. But is there  
20 anything else that it could be besides a leak originating at  
21 the connection between the fuel hose and, for lack of a  
22 better term, I'll call it the spud, the nozzle that protrudes  
23 from the gas tank?

24 **MR. BODE:** Oh, absolutely. And I frankly think  
25 Mr. Dyer is absolutely wrong. I don't think he followed 921

1 at all. And he has to analyze all of the hypothetical causes  
2 and then he has to, one by one, rule those out.

3 **THE COURT:** We jumped from Christoffersen to Dyer,  
4 and I was still on Christoffersen. Christoffersen says, in  
5 his supplemental report, that based on his experience as an  
6 engineer working in the automotive field as well as with  
7 beverage dispensers -- I grant you it may not be precisely on  
8 point, but he claims to be an engineer. His vitae clearly  
9 qualifies him by education, training and experience to offer  
10 opinions about these types of devices. And he says based on  
11 that experience that the nozzle in this case and the hose was  
12 not adequate.

13 **MR. BODE:** My response to that would be the fuel  
14 tank could have been a victim of the fire and not the cause  
15 of the fire. And if he is going to say that, if he is going  
16 to come to that conclusion, I'm not arguing his  
17 qualifications, I'm arguing his methodology and the  
18 reliability and the scientific testing and something that  
19 somebody can duplicate or replicate so that he sets forth how  
20 he did it, the pool test that he did or whatever. He's done  
21 none of that in his report.

22 And if you look at the *Hodges* case, which is --  
23 that's the ladder case, there the expert said, oh, well, you  
24 know, this ladder failed because it bent, and it either has  
25 to have defective metal or it was improperly made. And the

1 Fourth Circuit said no way, you don't just get to say your  
2 *ipse dixit*, your conclusion. They said you have to give some  
3 scientific methodology, something that's reliable that can be  
4 tested. And, you know, Your Honor, it's the same thing in  
5 *Cooper*. *Cooper* was the test with the pedicle screws where  
6 Dr. Mitchell, who, by the way, had never done a pedicle  
7 screw, said, if you have nonunion, the pedicle screw is  
8 defective.

9 And the Court said, well, what about the fact that  
10 this guy was a smoker? Couldn't that have caused the  
11 nonunion? And I would say to Your Honor, by analogy, what  
12 about the fact that this may have been a plowed leaf fire and  
13 that the gas tank burned up as a result of the fire at the  
14 front of the mower? It's entirely possible.

15 **THE COURT:** I agree with all of what you just  
16 described, but isn't that all just cross-examination of  
17 Mr. Christoffersen's opinion and the other -- the ladder case  
18 and the pedicle screw case are really -- what the holding  
19 there is, this is *res ipsa loquitur*, and we don't follow *res*  
20 *ipsa loquitur*?

21 Whereas, it appears to me what Mr. Christoffersen is  
22 doing is, it may be only by the slightest degree, but he has  
23 not just said a fire started and therefore it must have been  
24 leaking gas. What he had said is a fire started, I have  
25 experiences in examining the design of nozzles adhering to

1 rubber hoses. I've examined this nozzle and this rubber  
2 hose, and I opined, based on my experience with these types  
3 of connections, that this was the cause of the fire; the  
4 nozzle and the hose being not properly designed.

5 In other words, he is saying more than just --  
6 because in those cases there wasn't any dispute that the  
7 thing contributed to the -- you know, there wasn't any  
8 dispute about the cause. There is a sharp dispute about what  
9 caused this fire.

10 **MR. BODE:** Well, actually, I don't know what  
11 Mr. Christoffersen's theory is. Is his theory that under --  
12 because GM has a different way of hooking up a fuel line,  
13 that the product is somehow made to be defective? If that's  
14 the case, Your Honor, under *Higginbotham*, which is the ladder  
15 case, or *Hodges*, which is the bag fire case where there was a  
16 large explosion, there has to be some scientific test other  
17 than his I said it was so.

18 He has done no pool studies to examine when the hose  
19 comes off or how this fuel leak occurred. He has done none  
20 of that. And so there has to be something for us to test. I  
21 completely, but respectfully, disagree with Your Honor that  
22 this is for cross-examination. No, this is the gatekeeper  
23 function of the Court. And *ipse dixit* is not a theory;  
24 because I said there had to be a fire doesn't get it done.  
25 And it didn't get it done in *Cooper*, and it didn't get it



1 done in *Higginbotham*, and it didn't get it done in *Hodges*,  
2 and it didn't get it done in *Fireman's Fund*.

3           **THE COURT:** How is it different from what Mr. Wu  
4 wants to say about the cause of the fire? I mean, doesn't  
5 Mr. Wu say essentially the same thing? A fire occurred.  
6 I've examined the evidence. It's consistent with leaves  
7 accumulating under the deck, and therefore it must have been  
8 leaves accumulating under the deck. How is it any different  
9 for what Mr. Christoffersen wants to say about how the fire  
10 started?

11           I mean, Mr. Wu didn't test the mower with leaves and  
12 determine what the ignition point is against the manifold.  
13 He didn't run a mower that had this kind of problem. He  
14 didn't conduct his own examination of what the evidence was,  
15 other than just saying I've looked at what happened. I  
16 believe it was leaves under the mower deck.

17           **MR. BODE:** Well, his report which is -- we only did  
18 one report but his -- and he gave a deposition. In his  
19 deposition he came up with four hypotheses, including the  
20 only hypothesis that Mr. Dyer came up with, which was a fuel  
21 leak. And he said what about the fact that there was 12- to  
22 16-mile an hour winds with gusts to 24? Under NFPA 921, you  
23 have to address that. And Wu said, what about the fact that  
24 this is an air-cooled engine with a tremendous flow of air  
25 that goes down around the engine? What would that do to the

1 fuel vapor and where would it go?

2 And Mr. Wu's position is clear. Under NFPA 921, you  
3 have to identify all of the hypotheticals, and then you have  
4 to talk about why they either are possible or not possible.  
5 Here the fire marshal's ascertained that the cause was  
6 indeterminate. And Mr. Dyer has done no testing at all and  
7 he hasn't -- other than to give the wind the back of his  
8 hand, he has not addressed the downdraft fan. He hasn't  
9 addressed the wind speed. He hasn't addressed anything other  
10 than say, oh, well, that couldn't happen. But Mr. Dyer and  
11 Mr. Wu, of course, are experts on the fire. To get to them  
12 you first have to have a defect. And here  
13 Mr. Christoffersen's entire case was built on recalls. And  
14 Your Honor has dismissed all the recalls.

15 **THE COURT:** For now.

16 **MR. BODE:** Right.

17 **THE COURT:** For now.

18 **MR. BODE:** And, frankly, I think that's correct  
19 because the 2001 recall was the materials of the tag. That's  
20 right.

21 **THE COURT:** I mean, I recall that.

22 **MR. BODE:** Sure.

23 **THE COURT:** My only point was that that has been  
24 objected to. The plaintiff's entitled to have that looked at  
25 again by the District Judge who, I'm sure, will give it his

1 own careful scrutiny.

2 **MR. BODE:** Sure.

3 **THE COURT:** You may end up having the same argument  
4 again if the District Judge determines that I've erred in  
5 excluding that information. But I'm presuming that I haven't  
6 erred. That's what my usual practice is. And I'm taking  
7 issue, I guess, with the argument that Christoffersen's  
8 report says nothing other than the recalls.

9 And I want to ask you to respond to the suggestion  
10 that he also, he examined the lawn mower, and he rebuts some  
11 of what your experts say is the alternate cause. That is, he  
12 said the evidence that the mower was kept in poor condition  
13 and that the blade was in bad shape and that these things  
14 would have contributed, that is, Mr. Christoffersen is  
15 prepared to rebut some of that. You would agree he has the  
16 credential to do that, would you not?

17 **MR. BODE:** I'm not here to quarrel with his  
18 qualifications. If we were to 104(a) him, I wouldn't  
19 challenge him. He is a PE. But, I mean, and that goes to  
20 weight. This goes to whether or not he can testify. And all  
21 the things that you just mentioned, Your Honor, about the  
22 blade and whether or not the grass bagger was filled, I mean,  
23 I actually think you have to go to the scene and look at the  
24 machine, and I don't believe Mr. Christoffersen ever did  
25 that. And if he did, he failed to find out that the chute

1 that was at the scene was in a box that was in the shed  
2 house, and it was clogged with leaves inside the chute, and  
3 the baggers that were on the back of the machine -- the  
4 baggers burned up, but the leaves just fell straight down,  
5 and there were two big piles of leaves, and there was also a  
6 pile of leaves behind the machine. And so, you know, all of  
7 that goes to weight.

8 What I would say to Your Honor, and why we are  
9 really quarrelling with Mr. Christoffersen, is he has not  
10 identified a defect. What is the defect? That fuel somehow  
11 escaped the fuel system? How? How much fuel? Where does he  
12 detail that? Where is the report? Where is the study?  
13 Where is the analysis? Where is the methodology? It is not  
14 existent.

15 And if he wants to talk about GM, then the case law  
16 says that there has to be substantial similarity, and there  
17 isn't, between a GM fuel system with fuel injection and a  
18 fuel pump and a gravity-fed tractor, there is no similarity  
19 there at all. And he hasn't and never can at all address why  
20 it is that the 18,000 other units made in a similar fashion  
21 to this experienced no problems.

22 Go ahead, Your Honor.

23 **THE COURT:** No, that actually brings up an important  
24 question, which is something that we didn't run to ground  
25 quite as well as I wish we had when we were looking at the

1 issue of no prior accidents. What is Husqvarna's evidence of  
2 that? You say there have been -- there have literally been  
3 zero reports of fuel leaks and mowers manufactured with this  
4 system?

5 **MR. BODE:** Yes, Your Honor. Yes. With this design  
6 system. Yes, Your Honor, exactly. And we looked. And, you  
7 know, you would think you would see 1 or 2 out of 18,000;  
8 none. And Keith Degner will testify to that; none. So they  
9 have a computer database, and he examined it, and we examined  
10 the model family, not just this one tractor but the model  
11 family that had the same fuel system, same engine. We went  
12 through the model family; zero.

13 And that's telling because, as Your Honor knows, you  
14 would expect if there was some defect after five years,  
15 because this machine was made in 2005, and this incident did  
16 not occur until 2010, December of 2010, you would expect that  
17 there would be other problems.

18 With all of the recalls that occurred in '01, '04,  
19 '06, those recalls were all caught very quickly and all  
20 addressed very quickly by a manufacturer that really does  
21 care and follows through with its responsibility. And, you  
22 know, Mr. Christoffersen is just saying I'm an engineer. I  
23 have experience with fuel systems. I worked in the plastics  
24 industry making soda pop bottles, and I say that it had to be  
25 a fuel leak.

1           And the Fourth Circuit says the court has a  
2 gatekeeping function, and it is your job to establish that  
3 there is a reliable methodology, and here it's just not  
4 reliable.

5           **THE COURT:** All right. Let me hear from plaintiff's  
6 counsel.

7           Mr. Sullivan.

8           **MR. SULLIVAN:** Yes, Your Honor.

9           **THE COURT:** It will be greatly helpful to me if you  
10 can answer the question that Mr. Bode last put to me, which  
11 is, what exactly does Mr. Christoffersen want to say is the  
12 defect that he believes caused this fire?

13           **MR. SULLIVAN:** And that's exactly what I'll address,  
14 Your Honor. And I think that there is -- I'm going to have  
15 to talk a little bit about Smokey Dyer because it plays into  
16 it, but that's where I'm going because I think there is a  
17 mischaracterization or a misunderstanding of the process and  
18 that our experts went through, which is more of a real world  
19 process. Smokey Dyer is a fire investigator with -- nobody  
20 is going to argue about his credentials.

21           **THE COURT:** Nobody is arguing about anybody's  
22 credentials.

23           **MR. SULLIVAN:** Sorry, Your Honor.

24           **THE COURT:** No, no, that's all right. Go ahead.

25           **MR. SULLIVAN:** The way a fire investigator does

1 this, as I'm sure that you have had cases involving arson or  
2 fire before, the investigator, when they are working for, you  
3 know, a municipality, when they are not an expert, they go,  
4 they examine what there is to examine about the fire. And  
5 they rely on burn patterns and whatever other evidence they  
6 have, whether there is eye witness accounts, that whole body  
7 of evidence that's collected from the actual fire, and the  
8 fire investigator comes up with a cause and origin opinion if  
9 they can.

10 Okay. They do no testing to arrive at that. Now,  
11 we put people in prison for a long time based on that, so I  
12 don't think any testing is required. What happened in this  
13 case, Smokey Dyer went through the exact same process that he  
14 has his whole career. He investigated the fire. He came to  
15 the conclusion, based on the evidence that he found, burn  
16 patterns, testimonial evidence, Mr. Wright's wife, has  
17 evidence of what she sees when she came out, the timing  
18 that's involved, what she heard, whatever evidence was  
19 collected in photographic evidence by the fire department,  
20 the Chesapeake Fire Department's report, an inspection of the  
21 mower, Smokey Dyer came to the conclusion that this was a  
22 gasoline fuel-fed fire. Okay. And it originated in the area  
23 of the left side, lower left side of the engine where the  
24 melted aluminum is. And he equates that melted aluminum to  
25 that's where the pooling of the gasoline was.

1           Now, Mr. Wu disagrees. He has that melting more and  
2 being more hot because of oil. But that's really just a  
3 difference of the investigator's opinion. That's the first  
4 step. Smokey Dyer does a normal fire investigation and says  
5 the physical evidence, my opinion is, this is a gasoline  
6 fuel-fed fire, okay, originated on the left side. Then it  
7 goes to Mr. Christoffersen --

8           **THE COURT:** Well, before you move on to  
9 Christoffersen, I don't read Mr. Dyer's report as saying  
10 exactly that. He definitely says it burned hotter on the  
11 left-hand side. And there is no question if it is relevant  
12 at trial that this mower burned hotter on the left-hand side  
13 than on the right-hand side, if that becomes a debate about  
14 where the fire burned hottest, then it seems to me Mr. Dyer  
15 gets to testify about his observations.

16           There may be substantial room for disagreement about  
17 those observations, but the real question is whether that  
18 fact is a fact at issue in the litigation; whether burning  
19 hotter on the left is a fact at issue in the litigation,  
20 because I don't think Husqvarna is going to take that the --  
21 Home Depot or Ryobi is going to take the position that the  
22 gasoline didn't burn up and cause a very hot fire near the  
23 gasoline tank. That's stipulated, what else does Mr. Dyer  
24 get to say?

25           **MR. SULLIVAN:** They have, in fact, taken that



1 position, Your Honor. Their fire expert has said that there  
2 is no evidence that there is any or more than a minute amount  
3 of fuel in the gas tank, and perhaps -- because I actually  
4 went through that in his deposition, Your Honor. Well,  
5 you're not saying there is no gasoline involved? Eventually,  
6 these lines are going to melt and the gasoline is going to be  
7 released. No, he won't accept that as a possibility because  
8 he says we have no idea. It might have run the last bit of  
9 gas out of that tank right when this happened.

10 So that's actually not conceded. I believe that --  
11 I don't have Mr. Dyer's report right here in front of me but  
12 I do believe that he attributes that to a release of  
13 gasoline, although he --

14 **THE COURT:** Here's what he says. He says, "The  
15 material first ignited was gasoline vapor that came from  
16 liquid gasoline that had flowed from the fuel tank." I think  
17 there is a lot Mr. Dyer can offer about the things you just  
18 described in terms of the intensity of fire, but I don't see  
19 anything in his report that gives him that first ignition  
20 piece of evidence. I don't see what he's relying on to say  
21 that, unless it's Mr. Christoffersen, unless  
22 Mr. Christoffersen gets to testify that that's what it was.

23 **MR. SULLIVAN:** Right, and I believe what he is  
24 relying on, Your Honor, is -- well, melted aluminum,  
25 evidence -- you know, physical evidence that there is

1 evidence that gasoline was released. I think that's all he  
2 is saying, if I phrased it more than that.

3 **THE COURT:** I mean, because your reply, and this is  
4 very important to the way I anticipate writing this after we  
5 are done is, your reply suggests that all he wants to say is  
6 this was a gas-fed fire. This was an intense hot fire  
7 consuming a lot of gas or a significant amount of gas, and  
8 that is explained by the intensity of the flame or fire on  
9 the left-hand side where the fuel system was located and his  
10 observations of the burn patterns, and so forth.

11 But I don't see anything in his report that would  
12 permit him to say it was first caused by igniting gasoline  
13 vapors. I just don't see how he gets that from -- obviously,  
14 there was a fire, and there was a gas tank that is now gone.

15 So if there was gas in that gas tank, it was  
16 consumed -- or stands to reason that it was consumed and it  
17 would have burned hotly, but I don't know. That's what the  
18 experts are there to say.

19 **MR. SULLIVAN:** And I understand, Your Honor, and I  
20 think it's the next step that bridges sort of the gap there.  
21 Then once Smokey Dyer comes up with the opinion, you know,  
22 even if it's just that, this is a gasoline fuel-fed fire, not  
23 saying when or how, then it goes to the engineer because  
24 that's not supposed to happen. I mean, that's the simple,  
25 I'm talking about my process of what I want to find out

1 what's going on. Okay. It's a gasoline fuel-fed fire.  
2 You're not supposed to have a release of gasoline in a mower  
3 ordinarily like this, so engineer, Mr. Christoffersen, how  
4 can this happen? Looking at this mower, is there anything  
5 about this mower that makes this more likely to happen, that  
6 makes it -- there are defects? Look at this. He then does  
7 the full analysis that he had, and even leaving aside the  
8 recall, because I don't think that he's dependent on the  
9 recall to do his engineering analysis, he comes up that more  
10 probably than not if there is a gas -- accepting what  
11 Mr. Dyer says, this is a gasoline fuel-fed fire, where did it  
12 come from and how did it come, get released, and he goes  
13 through his opinions and arrives at -- as you have said.

14 And I do believe the recall, although the recall you  
15 have ruled that that's not relevant, and even if relevant,  
16 unfairly prejudicial, I understand that ruling. I don't  
17 think that that prevents an expert from relying on the  
18 information that was gathered by the company, regardless of  
19 if he says recall.

20 For instance, for example, one of the letters to the  
21 government in the 2004 recall is saying that, you know, an  
22 abrasion from the clamp on the fuel tank can cause a leak,  
23 and there actually are three incidents of that.

24 **THE COURT:** That precipitated the 2004 recall.

25 **MR. SULLIVAN:** '04 I believe, Your Honor, yes.

1           So I believe whether or not anyone comes in and says  
2 recall, which you have ruled is not going to be said, that  
3 doesn't mean an engineer, in looking at the history of it,  
4 sees the same fuel tank, the same spud, the same clamp, the  
5 same fuel line having an issue like that of saying, well, you  
6 know, the company is looking at that and had notice that this  
7 combination caused a leak.

8           He also relies on -- I know he talks about it in his  
9 report the type of barb. I know Husqvarna, the manufacturer,  
10 calls it a barb that holds it on there, is something that's  
11 sort of unique to injection molding. You can't make a sharp  
12 angle with injection molding. It has to pop out of the mold.  
13 And that is inadequate for securing the fuel line, so it's  
14 got a weak connection there. He also has personal experience  
15 of a cracking in the fuel tank.

16           **THE COURT:** I mean, I frankly disagree with you,  
17 Mr. Sullivan, that the evidence of the recalls has any  
18 relevance to what Mr. Christoffersen is going to say. And I  
19 know, I read your brief, your supplemental brief, and you may  
20 persuade Judge Jackson that I've made an error and he would  
21 permit this or even more, but in my view, the only reason any  
22 of that would have relevance is if it were -- if the recalls  
23 had relevance.

24           Because it isn't relevant to the engineer that a  
25 clamp abraded a gas tank unless the clamp is located in the

1 same way to abrade the gas tank on this model. And so far as  
2 I've seen, there is absolutely no evidence that that's the  
3 case.

4 If what you're saying is Mr. Christoffersen wants to  
5 say injection molding has problems, making a tight bend like  
6 this is problematic in injection molding, I know that from my  
7 experience in injection molding, and I've examined this tank,  
8 and I've examined other tanks, and based on my experience in  
9 the beverage industry, or whatever, I believe this is a  
10 defectively designed spud.

11 That seems, to me, to be consistent with his  
12 education, training and experience, perhaps relevant to the  
13 issues of what caused the fire. But one of the problems that  
14 I have, and I think Mr. Bode is struggling with, too, is that  
15 Mr. Christoffersen won't say that. He wants to say, I don't  
16 know. It could be a number of things. And he kind of hems  
17 and haws around nailing anything down. How are they supposed  
18 to cross-examine him if he won't say what the defect is? Is  
19 he willing to say that's it?

20 **MR. SULLIVAN:** I think this is what he will say,  
21 that at least from talking to him that I believe is his  
22 opinion. I don't know if he is clear enough in his report.  
23 His deposition obviously wasn't taken so there is -- there  
24 weren't questions to it, but I believe what he is saying is  
25 he is trying to be, in other words, realistic. All of the

1 evidence is burned. So he obviously -- I mean, I wouldn't  
2 find it credible for an expert to say the clamp failed and  
3 the hose fell off and released gasoline. What he is saying  
4 is that that connection, all right, because of exactly what  
5 you said, the injection molding not being able to have a  
6 barb, the fact that it's one piece instead of a fitting with  
7 a barb that allows that entire thing to be subjected to heat,  
8 makes plastics more brittle, vibrations over time, that there  
9 was a release of gasoline from a separation there of the hose  
10 from the fuel tank.

11 Now, what I don't think he is going to -- well, I  
12 know he is not going to offer, and he is not saying, is that  
13 he can say the precise manner, and otherwise the hose slid  
14 off, or, you know, the vibrations worked it off, or it  
15 cracked off because of the connection.

16 What he is saying is the connection failed, that he  
17 is certain of or at least to the degree that he is required  
18 as an expert. To say the precise manner when the entire  
19 thing is burned, I think, is not really possible because we  
20 can't go back and look at it. But what he is saying is the  
21 weak point in that system there is that connection for these  
22 reasons.

23 All right. And for these reasons, and looking at  
24 the connection, and understanding that Mr. Dyer, you know,  
25 has a release of gasoline, and also burning hot on that side

1 of the engine, where it would come from, is directly pointed  
2 at it, that his opinion is, to a reasonable degree of  
3 certainty, that that connection failed. I think that's his  
4 opinion. I think that's based on his experience. I think he  
5 can make that entirely without ever even seeing the recall or  
6 any of these recalls, I think he can render that opinion. I  
7 believe that -- it seems to me that some of the argument from  
8 the defense is his qualifications kind of masked his  
9 methodology or basis because they seem -- I mean, if we're to  
10 hold expert -- we are not to hold experts to standards in the  
11 courtroom that professionals in their actual field, when they  
12 are not being paid to do this, would be held to, at least I  
13 don't think we are. You know, for example, Smokey Dyer, to  
14 run a test to see how wind would affect things. The  
15 Chesapeake Fire Marshals did not do that to determine this.

16 **THE COURT:** No, I don't think he was saying that  
17 Smokey Dyer had to run a test. I think he was saying that  
18 Smokey Dyer had to make an observation about why the wind  
19 wouldn't have dissipated the gasoline vapors. And all Smokey  
20 Dyer does is say vapors ignite faster than leaves and  
21 therefore it must have been vapors, but I don't think he was  
22 suggesting that he had to run a test.

23 **MR. SULLIVAN:** But, I mean, one of the things that I  
24 think he is saying, and this is a -- I mean, I think he says  
25 in his rebuttal report that it's just not possible for a fire

1 of this intensity to start from leaves. I believe -- I'm  
2 paraphrasing, obviously.

3 **THE COURT:** Well, yeah, and that goes back to -- I  
4 mean, there is no question that Mr. Dyer believes that gas  
5 burned up in the fire and that that made it more intense.  
6 But the difficulty that I have with what he wants to say is  
7 not so much that it was an intense fire. It's that he  
8 doesn't appear to have any good information about what caused  
9 it to ignite in the first instance.

10 **MR. SULLIVAN:** Meaning what -- okay. I believe it's  
11 the -- and, again, I have his report here. I don't want to  
12 take time to flip through it, and you seem to know it very  
13 well. I believe that he at least listed contact with hot  
14 surface or hot manifold.

15 **THE COURT:** He does say that. He does say that, but  
16 unlike -- I mean, he does say that, but I don't see where in  
17 his report he has factual support for that other than he sort  
18 of distinguishes Mr. Wu's opinion and says I don't think it  
19 would have been the leaves, and gas burns faster than leaves.  
20 But obviously gas is supposed to be in a gas tank, and there  
21 is nothing in Mr. Dyer's report to suggest how gas would have  
22 gotten out of the gas tank in the first instance, unless he  
23 is relying on Mr. Christoffersen's opinion that the barb hose  
24 connection was a problem that caused the gas to leak onto the  
25 mower.



1           **MR. SULLIVAN:** I think what he is doing, Your Honor,  
2 is similar to what -- I mean, if the courtroom -- there was a  
3 fire in the courtroom, okay, and there was some question of  
4 whether there was gasoline, someone was trying to set it on  
5 purpose, okay. A fire investigator could come in, look at  
6 the physical evidence, and say wait a minute. Gasoline,  
7 pooling gasoline here, based on my physical examination,  
8 damage, areas of heat, was where this fire started, okay, and  
9 wouldn't need to have more than that, than the physical  
10 evidence to look at to do that.

11           I think that what -- I mean, it's clever in some  
12 ways of Mr. Wu, but when he uses the NFPA standard or  
13 methodology to come up with this idea that all of these  
14 hypotheses have to come up with, you have to come up with  
15 them, and you have to rule them out. Well, you don't have to  
16 rule out hypotheses, unreasonable hypotheses. And, frankly,  
17 the idea -- I mean, at least to Mr. Dyer, who's been in this  
18 business 50 years, the idea that some leaves caught on fire  
19 and set a man on fire such that his entire clothing was  
20 burned off him is not a hypothesis based on the damage of the  
21 mower, and what he found physically to the victim is not a  
22 hypothesis that is reasonable and does not really have to be  
23 tested to be ruled out.

24           **THE COURT:** I understand, but it's not their burden  
25 to show what caused the fire.

1           **MR. SULLIVAN:** I understand.

2           **THE COURT:** And there isn't any dispute that a fire  
3 occurred and that that fire consumed a gas tank. The  
4 difficulty that you're having and that I'm having, frankly,  
5 is what caused that fire to begin. I, frankly, think none of  
6 the experts have a great explanation for what caused it to  
7 begin.

8           **MR. SULLIVAN:** And I think, Your Honor -- from  
9 having taken Mr. Wu's deposition and going through this with  
10 him, is why it's a different understanding for me. Because  
11 what Smokey Dyer says is that for exactly the reasons you  
12 said, leaving aside how it starts, the intensity, the burn  
13 patterns, gasoline was involved, okay.

14           Mr. Wu's opinions fleshed out in his deposition  
15 essentially, when I asked him, well, how many leaves started  
16 this fire? He said, well, I don't know. I said, well, a  
17 hundred leaves? Well, I don't know. I said, could it have  
18 been as few as five leaves? He said, yes, it could have been  
19 as few as five leaves.

20           He also told me he has no evidence, and he is not  
21 conceding that there was any gasoline in the tank that was  
22 ever released, that it might have been running to just a  
23 hair's breadth of empty. Now when you view that, you know,  
24 isolated, saying, well, it could have been leaves from  
25 friction, it sounds real good, until we hear that it's really

1 not a realistic opinion or hypothesis that has to be ruled  
2 out.

3 I think what Chief Dyer is saying, in contrast to  
4 that, is there is no other way you get this kind of a fire  
5 with the intensity in the time that Mrs. Wright hears --  
6 various different descriptions of what she hears, but it's  
7 the ignition of gasoline is what -- I don't think anyone will  
8 disagree with.

9 **THE COURT:** Well --

10 **MR. SULLIVAN:** No, I think they said an exploding  
11 tire, I apologize. I correct myself on that. Hears that and  
12 comes out, that there couldn't be anything else other than  
13 gasoline that would burn the mower like that and start a fire  
14 that a person would not be able to get off the mower.

15 **THE COURT:** Mr. Wu says it was oil that burned  
16 that -- that it was oil escaping from the cylinder head  
17 after --

18 **MR. SULLIVAN:** Very late.

19 **THE COURT:** -- to the fire.

20 **MR. SULLIVAN:** Yes, very late in the fire. I think  
21 that the problem with that is that he has to get there with  
22 burning of a few leaves, and I think it's just a hypothesis  
23 that is -- you know, someone could come up with a hypothesis  
24 that, although is a bright, clear, sunny day with no storms  
25 for hundreds of miles, that a lightning bolt struck it and

1 caught it on fire, too, you wouldn't have to disprove that.

2           They are raising these theories with Mr. Wu when the  
3 fundamental determination that something was started by  
4 gasoline is somewhat, for an investigator, a matter of what  
5 else could have started this? And Smokey Dyer doesn't find  
6 it reasonable. I think he says that in his rebuttal report,  
7 that leaves could have started a fire that would have burned  
8 a mower like this, even if it compromised late in the fire.  
9 It's got to be big enough to compromise the tank also. So at  
10 any rate, Your Honor, I think that a little bit diverts from  
11 Mr. Christoffersen.

12           **THE COURT:** I understand. I think I understand what  
13 your points are, but let me ask you, just so that I get it on  
14 the record, the issue of his Poulan mower. There really  
15 isn't any dispute that the Poulan mower was -- because that's  
16 a separate motion to limit his testimony about his own mower.  
17 The reason he made those observations about his own mower is  
18 because it was part of the 2001 recall, correct?

19           **MR. SULLIVAN:** Yes, Your Honor.

20           **THE COURT:** Okay.

21           **MR. SULLIVAN:** Yes.

22           **THE COURT:** So I don't read Mr. Christoffersen's  
23 report as saying anything other than his 2001 mower leaked,  
24 and since that was a component of the 2001 recall, it seems  
25 to me that testimony would be encompassed with the Court's

1 ruling regarding the 2001 recall.

2           **MR. SULLIVAN:** I think in part. Here's what I do  
3 think is valid about his experience and even would be, I  
4 think, relevant, leaving aside the recall.

5           He has a mower. His mower developed a cracking from  
6 vibrations and a leak at that connection, okay, a very  
7 similar, if not exact same design connection as what we have  
8 in this case. So he experienced it over a -- what he found  
9 to be not outside the useful life of the product, okay, that  
10 that would experience vibrations, crack. He received a fuel  
11 leak. I don't think as an engineer viewing that saying this  
12 is what I've seen in looking at this, you know, this  
13 connection, there is a problem with either the connection or  
14 the materials, whatever he determined when he looked at that.  
15 Then he finds that they recall and change that. That's the  
16 point where I think that your ruling says, okay, he is not  
17 going to talk about that.

18           The fact that he has an experience with a very  
19 similar or substantially similar product, I don't think that  
20 that is necessarily something that -- that's a personal  
21 experience that he has that essentially confirms his opinions  
22 that, yes, this occurs with this type of connection.

23           **THE COURT:** Well, except that the reason he has a  
24 personal experience is because the tank was made out of a  
25 defective plastic, and Mr. Wright's tank was not made out of

1 a defective plastic. What I was -- you know, frankly, if  
2 Mr. Christoffersen had filed a rebuttal report and said I  
3 know my Poulan was made of the defective plastic but I've  
4 nonetheless examined the type of plastic in Mr. Wright's  
5 mower and find that it would be subject to the same type of  
6 problems because of X, Y and Z, but that's not what he did.  
7 He just wants to say my Poulan leaked and therefore  
8 Mr. Wright's mower leaked. And as I've tried to analyze in  
9 my prior opinion, I don't think there is enough similarity  
10 between the reasons for that '01 recall and the current  
11 mower, the Ryobi mower that caused or that was consumed in  
12 this fire.

13 **MR. SULLIVAN:** And I do understand your ruling, Your  
14 Honor. I was just -- the only characterization I was making  
15 as substantial similarity of the recall as opposed to  
16 substantial similarity of just an other incident of this  
17 happening, and also I think that going to this motion but not  
18 necessarily coming into evidence or being testified to by  
19 Mr. Christoffersen is, this is another piece of knowledge to  
20 consider that he has, even if he says, well, that's a  
21 different material, they changed the material, I don't know  
22 whether the materials are exactly the same, how they changed  
23 it, but yet this type of connection a failure, I think he can  
24 have that in terms of a basis to support his opinions,  
25 whether he says it or not. Because experts can rely on all

1 sorts of things to form the basis of their opinion if we are  
2 challenging their methodology or their qualifications or  
3 their basis that aren't necessarily going to be said in  
4 court.

5           **THE COURT:** Well, yeah, I understand that. But, I  
6 mean, if they are not going to be said in court, that's fine.  
7 If he is not going to come in and say, my Poulan leaked and  
8 therefore this leaked, there is no problem. If he wants to  
9 say it leaked, he needs to be able to say why it leaked. And  
10 so far the barest thread that I see in Mr. Christoffersen's  
11 testimony is, is his connection to injection molding and  
12 nozzle design and beverage industry and his opinion that this  
13 connection as a one-piece connection shouldn't have been  
14 designed this way. I, frankly, think it's a thin, thin read  
15 if he is permitted to testify.

16           And with regard to Mr. Dyer, as you have limited his  
17 testimony here, if all he wants to do is say I've examined  
18 the scene, I've examined the consumed lawn tractor, and I'm  
19 of the opinion that gasoline contributed to this melted  
20 alloy, that it burned much hotter on the left, and all the  
21 things that he wants to say about it being a gas-fed fire, it  
22 would appear to me he has the qualification to do that and  
23 that might be of assistance to the trier of fact but only if  
24 that is a relevant fact at issue in the case.

25           And most likely with respect to what Mr. Dyer wants

1 to say, I would write my order with a view to limiting it  
2 solely to that opinion and reserving the relevance  
3 determination for that opinion to the trial judge. Because  
4 you have said it's going to be relevant because they are  
5 going to dispute it. But what Mr. Bode has said in his  
6 papers is no one disagrees that this was a gas-fed fire. So  
7 I'm going to ask Mr. Bode about that. But understand that if  
8 Mr. Dyer, if I determine -- I'm only making the expert  
9 inquiry. I'm not determining relevance, unless Mr. Bode  
10 concedes it, which I think is highly unlikely. So I wanted  
11 that to be clear.

12 **MR. SULLIVAN:** And I think just for the -- I think,  
13 yes, I am saying that, Your Honor. Just in addition to that,  
14 I think I am saying that he does have the ability and should  
15 be allowed to give the opinion that there is no other  
16 reasonable cause for this fire if not the ignition of  
17 gasoline as the first material ignited.

18 The only other thing there, frankly, are the leaves,  
19 and it's in dispute factually, but let's just assume that the  
20 leaves that Mr. Wu talks about are there. The only other  
21 material there, that can be ignited besides engine oil, which  
22 is conceded by Mr. Wu, does not come until late in the fire  
23 when the plastics burn through. The only things that the  
24 experts have come up with that can burn, okay, are leaf lawn  
25 material and gasoline.



1           And what Chief Dyer, and I think he's -- I think he  
2 gets at it in the rebuttal opinion, that this can't be a fire  
3 that started from leaves and lawn material. It's just not  
4 consistent with any of the burn patterns, any of the damage,  
5 the intensity of the fire, the spread of the fire.

6           **THE COURT:** He does say that.

7           **MR. SULLIVAN:** That being --

8           **THE COURT:** And I think that's permissible for him  
9 to say. If Mr. Wu testifies, it would be permissible for  
10 Mr. Dyer to rebut that testimony, but he still doesn't have  
11 any way of explaining how the gas got out of the tank, at  
12 least he doesn't.

13          **MR. SULLIVAN:** Right.

14          **THE COURT:** Now, if Mr. Christoffersen is permitted  
15 to say it did, then maybe Mr. Dyer can say that would be  
16 consistent with my observations at the scene. But I don't  
17 think anything in Mr. Dyer's observations give him the  
18 ability to say, as a matter of the first opinion, that it  
19 began with gas leaking out of the tank.

20          **MR. SULLIVAN:** And I think that the part that I will  
21 tell you if certainly he is not going to say, is it began  
22 with leaking out of the line, leaking out of the tank,  
23 leaking out of here, it is within his expertise to say that  
24 the first material ignited was gasoline. It's no different  
25 than if he does an arson investigation. Nobody knows what

1 was in the room, and as a result of the investigation,  
2 determines that, you know, this is the first material ignited  
3 and started the fire.

4 Now it's not within his qualifications to say that a  
5 failure in that tank dumped it onto there. But it is within  
6 his expertise, and it's frankly what the fire investigators  
7 do, is to determine, well, this was a gasoline fire, this was  
8 not a gasoline fire, this was some other material, it's the  
9 cause and origin of fire, and they base that on the physical  
10 evidence.

11 And one of the ways of doing that is what Mr. Bode  
12 is suggesting, that they have to consider what else can make  
13 a fire this intense that we have this happen to the mower  
14 this quickly? Well, the only thing on the mower is gasoline  
15 that can do that, and then he can match that with the burn  
16 patterns and say, well, yes, gasoline was ignited as the  
17 first fuel ignited.

18 To say where it came from, that's what I was  
19 starting to explain in the beginning, that's what he does.  
20 Then we say, okay, how did this happen or how could this have  
21 happened? Could something with the way the mower designed  
22 cause this to happen, and you go to Mr. Christoffersen.  
23 Anyway, I just wanted to clarify. I think we both understand  
24 each other. I just wanted to make sure I wasn't --

25 **THE COURT:** Well, I'm going to write something so --

1           **MR. SULLIVAN:** I understand.

2           **THE COURT:** -- you're not going to be stuck with  
3 just my comments from the bench. I have a feeling this is  
4 going to be examined again, too, so I'll write something.

5           Did you have anything else you wanted to say,  
6 Mr. Sullivan?

7           **MR. SULLIVAN:** The one thing I just wanted to add is  
8 just sort of as a matter of record and not arguing really, if  
9 anything, just that Mr. Christoffersen, in terms of what he  
10 relied on to arrive at his opinions, among the things are,  
11 you know, documents of the manufacturer, any admissions,  
12 design drawings, any materials produced by the defendant  
13 directly from the manufacturer, admissions and statements of  
14 engineers of manufacturer, two of which one former engineer  
15 now expert witness, one current engineer who were deposed,  
16 and Mr. Christoffersen, at least in terms of when we get to  
17 his rebuttal report, has consideration of those. He also  
18 examined exemplar mowers. He examined the subject mower. He  
19 relied on fact witness statements and testimony.

20           **THE COURT:** Now, see, you just changed your  
21 operative verb there. There is no question that he examined  
22 a whole wealth of material. But when you say he relied on,  
23 that's a much, much narrower, narrower class of material, and  
24 that's really the problem that Mr. Christoffersen has, is  
25 that it doesn't matter if he read an encyclopedia of lawn

1 mower design and built this lawn mower himself, if he doesn't  
2 rely on that expertise in forming his opinion.

3 And that's why I say, to the extent he is relying on  
4 something, what appears to me to be still a viable issue  
5 after the recalls is he knows injection molding, he knows  
6 nozzle design, he knows this type of connection, and relying  
7 on that expertise, he wants to opine that this connection was  
8 bad. But the fact that he examined exemplar mowers and this  
9 mower and the documents from the manufacturer, he isn't  
10 relying on any of that because none of that supports his  
11 opinion that this was a defective design.

12 And so that's really the issue, that I think if he  
13 is permitted to testify, it's going to be very circumscribed  
14 by what he really did rely on, not every single thing he's  
15 examined, because he didn't rely on a lot of what he  
16 examined, or to the extent he did, I've determined that they  
17 are not sufficiently similar to permit him to rely on them.

18 **MR. SULLIVAN:** And I obviously don't want to reargue  
19 that, Your Honor, and I didn't mean for there to be a  
20 distinction.

21 **THE COURT:** I wanted to make sure you understood  
22 that I know that Mr. Christoffersen, that there is a wealth  
23 of material here. There is a lot of evidence that he's  
24 examined, and some of what he examined is relevant to other  
25 opinions he wants to offer.

1 I know he wants to talk about the maintenance of the  
2 mower and its condition when Mr. Wright operated it, and to  
3 the extent these matters get litigated, I believe he did rely  
4 on the condition of what he examined to offer some of those  
5 opinions.

6 **MR. SULLIVAN:** That's all that I'm saying, Your  
7 Honor. I wanted just to make sure that -- I mean, whether or  
8 not things are found relevant or not, at least he -- his  
9 opinions, he says he relies on these things, I completely  
10 understand your ruling, Your Honor, and relying on things  
11 that you deem not relevant you find not to be an issue. I  
12 just wanted to put on the record that he did, at least in his  
13 opinion, he relies on these things.

14 **THE COURT:** Okay.

15 **MR. SULLIVAN:** All right. Thank you.

16 **THE COURT:** Mr. Bode.

17 **MR. BODE:** Briefly, Your Honor.

18 **THE COURT:** Certainly, and you don't need to spend  
19 any more time on the Poulan mower issue. I don't have any  
20 difficulty excluding Mr. Christoffersen's testimony about the  
21 Poulan mower. But let's talk about Mr. Christoffersen.

22 **MR. BODE:** Okay.

23 **THE COURT:** I think you have a sense of the  
24 direction I'm leaning.

25 **MR. BODE:** So, Your Honor, first of all, the

1 plaintiff has the burden of proof. And it is one thing to  
2 say, look, this is how we do it in the real world, but, you  
3 know, and that's sort of what I heard from Mr. Sullivan in  
4 his argument. But if you look at *Kumho Tire*, and you look at  
5 the *Cooper versus Smith and Nephew* case, in that case, Your  
6 Honor, the Court held that the expert has to follow the same  
7 level of intellectual rigger in the courtroom as in the  
8 field. And I go back to what I said at the beginning of my  
9 remarks, Your Honor. There is nothing in his report,  
10 nothing, that says what the defect is. Your Honor has  
11 pointed to one thing where he says, well, maybe it's this  
12 barb or the way this injected fuel is designed.

13 And I say, okay, that could be tested. He could  
14 have done that. He did not do it or maybe he did it and his  
15 tests didn't turn out the way he wanted to, and that's why he  
16 hasn't put it in his report. I don't know, Your Honor. But  
17 I know this, under the case law in the Fourth Circuit, we  
18 have to have testing that has a methodology that's reliable  
19 that can be duplicated, and we have none of that.

20 **THE COURT:** If he wants to testify about a test,  
21 then it has to be reliable and capable of duplication. But  
22 not every expert is going to engage in testing. I mean, I  
23 understand your point, but I don't think it's a question of  
24 every single expert observation is capable of testing, or if  
25 it is capable of testing, that the expert actually has to

1 test it.

2 I agree that it's a thin, thin report, Mr. Bode,  
3 but let me just present it to you this way, the way  
4 Mr. Sullivan presented to me. There isn't any dispute that a  
5 fire happened on this lawn mower and that that fire came into  
6 contact with gasoline. And those facts are not going to be  
7 in dispute, and that is not supposed to happen. And so  
8 what Mr. Christoffersen is trying to do is the same thing  
9 that your experts are trying to do, which is to explain why  
10 they believe it did happen in this instance.

11 **MR. BODE:** Mr. Wu will say we don't know how much  
12 gasoline was in the tank, and no one does. Because we know  
13 this, we know that Mrs. Wright has testified that her husband  
14 couldn't put any gasoline -- he couldn't service the mower  
15 anymore. And we know that the gas tanks were found in the  
16 garage and they still had dust on them. So no gas had gone  
17 into that tractor that day.

18 And we know, according to their own briefs and their  
19 own report and Mr. Christoffersen's report, that he had been  
20 operating the mower for an hour. So Mr. Wu has said we have  
21 no idea how much gas was in there, and he has said the  
22 left-sided burn could have been the oil, just as Your Honor  
23 pointed out.

24 The fire marshals said the cause was indeterminate.  
25 It is not the defendant's burden of proof. It is the

1 plaintiff's burden of proof, and under the clear Fourth  
2 Circuit case law, and it's every case, they have to have some  
3 scientific methodology and come forward and say what is the  
4 defect and how it's defective. And here not only do they  
5 have no testing to establish that it's defective, they have  
6 counter-evidence that is admitted, which is there are 18,000  
7 other tractors in this model family and zero other fires,  
8 zero other fuel separation lines from the nipple.

9 So just to say -- just to say that he has that  
10 theory because of something that he saw on a car is not fair  
11 because the Fourth Circuit says, if you're going to compare  
12 apples to apples, it can't be apples to oranges, and you have  
13 to prove, you, the plaintiff, have to prove substantial  
14 similarity.

15 **THE COURT:** If my ruling stands, you've already won  
16 that battle, Mr. Bode. But there has now been one fire among  
17 these 18,000 mowers, right. There is at least one of them  
18 that burned up --

19 **MR. BODE:** That's true.

20 **THE COURT:** -- and killed a person. It's  
21 unfortunate. It's tragic, but it happened.

22 **MR. BODE:** Everything you've just said I completely  
23 agree with.

24 **THE COURT:** Okay. I'm assuming Husqvarna doesn't  
25 have any other reports of one burning up because the leaves



1 caught on fire under it too, right? There is no history of  
2 these mowers catching on fire for any reason? This one did.

3 **MR. BODE:** That is true, but this one was, in  
4 candor, operated by an 88-year old man who couldn't remember  
5 what he had for breakfast in the morning, whose wife had  
6 buzzers on the door so that she would know if he went out,  
7 who couldn't walk, who couldn't extricate himself from the  
8 machine when it caught on fire, and the plaintiff has to have  
9 a reliable theory with methodology that can be tested. And  
10 this isn't Mr. Bode saying this; this is the Fourth Circuit.  
11 And they have evaluated this.

12 So, look, Dyer completely relies on Christoffersen.  
13 He says maybe the fuel spud came off. Maybe, that is -- it  
14 has to be to a reasonable degree of engineering certainty.

15 **THE COURT:** Have you deposed Dyer?

16 **MR. BODE:** No, and he is limited to his report, and  
17 so is Christoffersen.

18 **THE COURT:** Right. I'm fine with what you've just  
19 said about Dyer. I don't believe Mr. Dyer would be permitted  
20 to testify as to the fuel leaking from the gas tank as being  
21 the original source of ignition. But he does offer a lot of  
22 information about the burn patterns that he observed, the  
23 intensity of the fire. It sounds to me like some of that  
24 could well be contested and subject to dispute.

25 The bottom line issue, and I know -- you know,

1 you're going to have another bite at this apple, too, if you  
2 want, and you might want to go ahead and get on Judge  
3 Jackson's docket. Maybe he can hear all this together. But  
4 if Christoffersen is permitted to say that he found the  
5 fuel-to-nozzle connection defective because of what he's  
6 observed, particularly in his rebuttal report about his  
7 experience with the way it was designed; it was a one-piece  
8 molding and not a two-piece molding, and the barb wasn't  
9 sufficient, and in his view that's what caused it, if he is  
10 permitted to say that, then all this other evidence that  
11 Mr. Christoffersen and Mr. Dyer want to offer becomes  
12 relevant to respond to Mr. Nielsen and Mr. Wu.

13 Because there is a lot in their reports that rebuts  
14 Husqvarna's alternative theories of how the fire was caused.

15 **MR. BODE:** I mean, everybody agrees that the fire  
16 started not back at the gas tank but up at the exhaust  
17 manifold. And Mr. Dyer isn't going to say anything about  
18 that if my objection to that -- if we were to try this case  
19 would stand because he doesn't describe how the fire started.  
20 Because gas vapors at the gas manifold, the gas manifold's  
21 temperature -- he doesn't have any of this in his report.

22 **THE COURT:** The exhaust manifold.

23 **MR. BODE:** Yeah, the exhaust manifold is not hot  
24 enough. So there would have to be something else. His  
25 report, Mr. Dyer's report is absolutely silent on that, other

1     than to just *ipse dixit* say it started at the exhaust  
2     manifold. The exhaust manifold on this tractor is on the  
3     right front of the engine. The gas tank is behind the engine  
4     and above the engine.

5             But Dyer relies on getting gas vapors somehow to the  
6     front of the machine. We don't have a defect. We don't have  
7     anything that we can test or analyze or examine from  
8     Mr. Christoffersen, and his report is silent on it. And when  
9     challenged on that, the plaintiff said what I said before.  
10    I'm not going to repeat it other than, you know, we have all  
11    of these recalls.

12            So, Your Honor, it's absolutely clear that under all  
13    of the case law and *Cooper*, *Higginbotham* and *Hodges*,  
14    *Fireman's Fund*, *Oglesby*, every one of them, there has to be  
15    something that rises to the same level of intellectual rigger  
16    in the courtroom as in the field, and that has to have a  
17    clear reasoning or methodology that is scientifically valid.  
18    And for Mr. Christoffersen to just say it, doesn't make it  
19    scientifically valid.

20            **THE COURT:** Let me ask you one more question.

21            **MR. BODE:** Yes, sir.

22            **THE COURT:** I know you're getting tired.

23            **MR. BODE:** No, I'm not. I'm not at all. I'm  
24    actually enjoying this.

25            **THE COURT:** Okay. Good.

1           **MR. BODE:** Yeah.

2           **THE COURT:** Because there is one other subject that  
3 we haven't talked about, and that is the replacement fuel  
4 tank. And I know your position is -- well, I don't know what  
5 your position is. What is your position? Why wouldn't  
6 Mr. Christoffersen be able to say in his experience,  
7 coincident with his experience with injection molding and him  
8 thinking this nozzle design was not proper, that Husqvarna  
9 introduced a replacement tank that was sold to people who had  
10 this mower, the recall -- I mean, the right mower, and that  
11 that replacement tank utilized a different design and that  
12 different design is evidence that it knew its first --  
13 regardless of the other three recalls, that it's evidence  
14 that it knew the same things that Mr. Christoffersen wants to  
15 opine, based upon his experience in dispensing beverages,  
16 that is, that the injection molded, one-piece barb was not a  
17 good design and so it redesigned it?

18           **MR. BODE:** So two points there. In 2006 when they  
19 began having problems with the low-perm tanks and fuel lines,  
20 they went back to the old fuel line. That was their initial  
21 fix with the CPSC, when they did the recall. They went back  
22 to the fuel line that Mr. Wright had on his tractor.

23           Now, five years later, when this fire happens, if  
24 you order a replacement tank, you're now subject to the laws  
25 of the EPA, the laws of the State of California, which say in

1 order to keep gas vapor fumes from getting up into the  
2 atmosphere, we are going to have low permeation fuel tanks  
3 and low-permeation fuel lines, and Husqvarna knew that that  
4 was coming, which is why they made the switch in 2006.  
5 Unfortunately, the first set up of low-perm fuel tank,  
6 low-perm fuel line, they had to go back to the non-low-perm  
7 fuel line because of the slippage problems that they had.  
8 And then they redesigned the whole thing to accommodate the  
9 EPA and the State of California.

10 But none of that has anything to do with whether or  
11 not this tractor at the time it left the manufacturer was  
12 defective. And it wasn't because it had a tried and true  
13 fuel system, 18,000 of which never had a problem, and so  
14 there is nothing defective about this tractor. The fact that  
15 you can now get a different fuel tank is simply because the  
16 EPA mandates that all fuel tanks be low-perm fuel tanks and  
17 all fuel lines be low-perm fuel lines.

18 **THE COURT:** So they are not making any fuel tanks  
19 any more that do not use low-perm fuel lines?

20 **MR. BODE:** Is that right? I'm wrong?

21 **MS. CRONIN:** No, you're correct.

22 **MR. BODE:** They are not. I think that's right, Your  
23 Honor. I mean, I understand I am an officer of the court,  
24 and I understand I'm making statements here, and I want to be  
25 right. I don't believe that they are making anything other

1 than low-perm fuel tanks and fuel lines under the EPA rules  
2 and the California rules.

3 **THE COURT:** It's important because to me the issue  
4 of the replacement tank is not completely encompassed by the  
5 Court's prior ruling on the recalls. That is, because I  
6 understood there were two things going on: One, they changed  
7 the tank to address this low-perm fuel line issue, but that  
8 they also stopped making the other tank, even in markets  
9 where low-perm fuel lines were not required. That is, they  
10 changed everybody's tank and sold one product. Now, there  
11 may be good business reasons to do that.

12 **MR. BODE:** I think Dan Nielsen testified -- and I  
13 don't have the years now or anything else, but I think in his  
14 deposition someplace he said that in '08 or '09 the EPA  
15 passed the rule, the regulation that all fuel tanks, fuel  
16 lines had to be low perm. And so I don't really think that  
17 it was any issue other than they had to go to low perm and  
18 they knew it.

19 **THE COURT:** Okay.

20 **MR. BODE:** Based upon the regulations.

21 **THE COURT:** I'm going to give Mr. Sullivan -- it's  
22 really Mr. Bode's motion so you don't get a chance to  
23 respond, but I'll give you a chance very briefly to address  
24 this issue, because it is important to me. And what I'm  
25 going to ask you to do, Mr. Bode, is would you file a

1 supplemental exhibit to that effect that whatever, you know,  
2 give me two pages, and if you need, a short declaration of  
3 why the two-piece tank is in use across all models.

4 **MR. BODE:** I'll be delighted to.

5 **THE COURT:** Mr. Nielsen has testified that it was  
6 adopted because everyone had to use low-perm fuel lines.  
7 That would be an important fact for me to understand in  
8 connection with the relevance of that two-piece tank.

9 **MR. BODE:** Yes, and I'm -- I may be -- there is a  
10 lot of evidence here, and I may be remembering it wrong, but  
11 I think it's in his dep --

12 **THE COURT:** If you are, I'm not going to hold it  
13 against you in the least because it wasn't -- you weren't on  
14 guard that I was going to inquire about it. But I'm  
15 interested to know the exact fact, which is why I want you to  
16 research it and file it.

17 **MR. BODE:** It will be done tomorrow, but I will tell  
18 you that I think it's in the deposition that Mr. Sullivan  
19 took of Mr. Nielsen. I think he asked him that.

20 **THE COURT:** All right. Mr. Sullivan, if you want to  
21 say something very briefly limited solely to that issue of  
22 the two-piece tank, I'll let you respond. What's your  
23 recollection of the evidence on that subject?

24 **MR. SULLIVAN:** Well, I'm going from -- I did take  
25 fairly lengthy depositions of Mr. Nielsen and also

1 Mr. Degner, who's currently at Husqvarna, and both of  
2 which -- I think Mr. Degner was a little newer at this time,  
3 but they were both there when this actually happened at  
4 Husqvarna, so they do have more than just knowledge that they  
5 gained from someone educating them.

6 As I recall, this model lawn mower, Ryobi model lawn  
7 mower that we have in this case, was never one that was ever  
8 given low-perm lines, ever. And that now if you order or --  
9 well, at least now, but sometime ago, too, I think that the  
10 parts manuals will document farther back in time, you order  
11 the replacement tank for it, you get the one that we are  
12 discussing, the two-piece replacement tank.

13 I believe, whether it's Mr. Degner or Mr. Nielsen, I  
14 will have to go back and check. I'm fairly certain that when  
15 they tried to relate it to the low-perm issue, and that,  
16 well, now we changed it not because of an issue with the  
17 tanks but because the EPA said we had to use low-perm on  
18 everything. I believe what they said to me -- and this is a  
19 credibility issue of whether that's -- whether that story is  
20 quite true, I said, well, when -- if you have this Ryobi and  
21 you order the new tank and they send you the replacement,  
22 okay, you don't get a replacement fuel line if you just buy a  
23 replacement tank.

24 So then you put the low-perm one on with your old  
25 fuel line, saying that you have never replaced it. So now



1 you have a non-low perm with a low-perm tank, and there was a  
2 whole discussion of whether maybe that would be an issue that  
3 they said, but everybody got this low perm or not low perm.  
4 And I believe the testimony is either that they didn't or  
5 they do not know. Do they always send that with a low-perm  
6 line because that's a requirement? And these are the guys  
7 who would know.

8 **THE COURT:** Okay. Well, I'm going to ask you to do  
9 the same thing. If you could submit a very short, I mean,  
10 two- or three-page supplemental filing, and if you want to  
11 attach some excerpts from Mr. Degner or Mr. Nielsen's  
12 deposition, but no more than five or six pages. I can't  
13 imagine it went on more than that.

14 So if you want to submit a short supplemental filing  
15 articulating your view of the two-piece tank issue, I'd like  
16 to know what the actual evidence is of that because I know  
17 that the two-piece tank was more broadly used than just on  
18 the recall tractors. And that may be relevant evidence for  
19 me to consider in ruling on whether Mr. Christoffersen gets  
20 to opine.

21 **MR. SULLIVAN:** I will do that, Your Honor.

22 **THE COURT:** All right.

23 **MR. SULLIVAN:** Mostly going to be citations to their  
24 depositions, which I'll provide copies of and citations.

25 **THE COURT:** All right. Well, I know Thanksgiving is

1 coming up. I'll give you until -- how about by Wednesday of  
2 next week to get that in? Is that all right?

3 **MR. SULLIVAN:** That's fine for us, Your Honor.

4 **THE COURT:** Mr. Bode?

5 **MR. BODE:** Yes, Your Honor, that's fine. And,  
6 frankly, Your Honor, I actually agree with what counsel said  
7 on the fuel tank. I think he is -- I think he is right. If  
8 you order it today, you're going to get the fuel tank. But,  
9 you know, remember, he is right, they never changed the 2005  
10 model because that model was made back in 2005.

11 **THE COURT:** I understand.

12 **MR. BODE:** Frankly, this tractor didn't have a new  
13 fuel tank and this tractor didn't have a new fuel line. This  
14 tractor had the fuel line that was made when it was built in  
15 2005.

16 **THE COURT:** Right. But it is still relevant to me,  
17 at least in my mind, in analyzing the experts, what they want  
18 to say is, is the reason they adopted that two-piece tank,  
19 because everyone was now moving to low-permeation fuel line?

20 **MR. BODE:** The answer to that is yes.

21 **THE COURT:** Okay. Okay.

22 **MR. BODE:** Thank you, Your Honor.

23 **THE COURT:** You're welcome. And thank you all for  
24 your cordial argument and well-documented briefs. I'm going  
25 to, after I get your supplemental exhibits, get you something

1 in writing, which will detail my thoughts, and you will have  
2 an opportunity to review that and take it up again.

3 What I would suggest -- you all can proceed however  
4 you want, but in terms of efficiency, it may make more sense  
5 to wait until you get that in before you go forward with your  
6 objections on the other end, just bring it all to Judge  
7 Jackson at one time.

8 Because probably one of you is going to be unhappy  
9 with whichever way I go on this one, too. And Judge Jackson  
10 asked me to weigh in on this because I had already become  
11 familiar with it in the course of preparing for the final  
12 pretrial conference. He obviously will dive into them to the  
13 extent you raise objections to what I've ruled and apply the  
14 appropriate standard in deciding whether I've made an error.  
15 I'm sure he would welcome whatever arguments you all want to  
16 present to him on all of those subjects. But I will -- and I  
17 think you can already sense which way I'm going on this, that  
18 is, that I'm going to exclude the Poulan lawn mower  
19 testimony.

20 To the extent Dyer is permitted to testify, it's  
21 going to be a narrow range of testimony consistent with what  
22 has been proffered in the reply brief, and I will reserve the  
23 relevance determination to the trial judge. Because I don't  
24 know, frankly, whether a lot of what he is going to testify  
25 to will be relevant to a fact at issue in the litigation.

1           The issue with Christoffersen is a closer call. I  
2 want to scrutinize it more closely. I want to examine the  
3 case law that's been cited to me again and see how you all  
4 relay this two-piece tank. To the extent he is permitted to  
5 testify, it's going to be on a very, very narrow part of his  
6 opinion with respect to defect. And if that testimony is  
7 permitted, then he would be able to offer more opinions  
8 concerning the opposition to what Mr. Nielsen wants to say.

9           But the last thing I'll say is that I think that  
10 this is an extremely difficult case for the plaintiff. And I  
11 think it's an extremely difficult case even to reach the jury  
12 on liability, and all of what Mr. Bode has also said is  
13 totally apart from whether there has been any proof of defect  
14 here, that is, the very, very, very compelling case for  
15 contributory negligence in this case.

16           All of that, though, is apart from defect. That is,  
17 Mr. Wright's physical condition, his ability to quickly exit  
18 the lawn mower when this fire did happen, all of those things  
19 suggest to me that this is a case that the plaintiffs ought  
20 to seriously consider resolving. And I know you all have  
21 made an effort with Judge Tommy Miller in the past, and I  
22 strongly encourage you to revisit that.

23           If you think another session with Judge Miller would  
24 be helpful, I encourage you to request one. I'm sure he will  
25 be happy to sit with you again in trying to resolve the case.

1 It's a tragic, tragic thing and a horrific death that  
2 Mr. Wright suffered, but I think that the plaintiff has an  
3 extremely difficult liability case given the evidence that  
4 was left after the fire and given the record of the  
5 manufacturer of this particular mower.

6 Even if they succeed in reaching the jury on  
7 liability, I think the contributory negligence case is  
8 extremely compelling, and I strongly urge the plaintiffs to  
9 think about another sit-down with Husqvarna and maybe see if  
10 you can't get this case worked out.

11 But I will get you an opinion as promptly as I can  
12 after your supplemental exhibits that you will have time to  
13 consider that, arrange whatever review you feel needs to be  
14 arranged with Judge Jackson, and be ready for trial in  
15 January if it doesn't get resolved. All right.

16 **MR. SULLIVAN:** Thank you, Your Honor.

17 **MR. BODE:** Thank you, Your Honor.

18 **THE COURT:** Thank you all. Court's in recess.

19 (Hearing adjourned at 3:50 p.m.)  
20

21 CERTIFICATION  
22

23 I certify that the foregoing is a correct transcript  
24  
25

1 from the record of proceedings in the above-entitled matter.

2  
3  
4 X\_\_\_\_\_/s/ Tamora Tichenor\_\_\_\_x

5 Tamora Tichenor

6 X\_\_\_\_12/12/2014\_\_\_\_x

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